82-1759

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

T-1740 TRUSTS, MERCANTILE BANK AND TRUST COMPANY, LIMITED, TRUSTEE, TRANSFEREE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner can have a tax liability as a transferee even though it was judicially determined that its transferor had no tax liability.

2. Whether a notice of deficiency may be properly transmitted by ordinary mail even though section 6212(a)[1] requires transmittal by either certified or registered mail.

[1] All references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

LIST OF ALL PARTIES TO THE PROCEEDINGS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

T-1740 Trusts, Mercantile Bank and Trust Company Limited, Trustee, Transferee, Petitioner[2]

Commissioner of Internal Revenue, Respondent

[2] Mercantile Bank & Trust Company Limited ("Mercantile"), as Trustee of T-1740 Trusts, was the petitioner below, and the caption of this petition indicates that Mercantile is the appellant. However, subsequent to the filing of the Tax Court petition below, Canadian Imperial Bank of Commerce Trust Company (Bahamas) Limited ("CIBC") succeeded Mercantile as the Trustee of the T-1740 Trusts and CIBC is the duly qualified and acting Trustee of T-1740 Trusts. CIBC, like Mercantile, is a corporation organized under the laws of the Bahama Islands and CIBC has its registered office in the City of Nassau, Bahama Islands (P.O. Box 3933).

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v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, T-1740 Trusts, Mercantile Bank and Trust Company Limited, Trustee, Transferee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding January 25, 1983.

OPINION BELOW

No opinion was rendered by the Court of Appeals. The judgment of the Court of Appeals appears in Exhibit A of the Appendix hereto. The memorandum sur order of the Tax Court, not reported, appears in Exhibit B of the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 25, 1983, and the petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Internal Revenue Code of 1954, as amended:

Section 6901. Transferred Assets.

(a) METHOD OF COLLECTION. The amounts of the following liabilities, shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income—Estate and Gift Taxes.—

(A) Transferees.—The liability, at law or in equity, of a transferee of property—

(i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes) . . .

(b) LIABILITY. Any liability referred to in subsection (a) may be either as to the amount of tax shown on a return or as to any deficiency or underpayment of any tax.

Section 6212. Notice of Deficiency.

(a) In General—If the Secretary determined that there is a deficiency in respect of any tax imposed by Subtitle A or B or chapter 41, 42, 43, 44, or 45, he is authorized to send notice of such deficiency to the taxpayer by certified or registered mail.

STATEMENT OF THE CASE

The tax return of Hotel Equities Corporation, a Delaware corporation (hereinafter sometimes referred to as the "taxpayer-transferor") was due on July 15, 1970. (D.2.)[3] The taxpayer-transferor properly mailed the return to the appropriate Internal Revenue Service Center on July 14, 1970. (D.2.) The return was received by the Internal Revenue Service on July 17, 1970. (D.2.) On July 17, 1973, respondent mailed to the taxpayer-transferor a notice of deficiency for the fiscal year ended January 31, 1970. (D.2.) The taxpayer-transferor timely filed a petition with the Tax Court challenging the proposed deficiency assessment, alleging, *inter alia*, that assessment and collection of the proposed deficiency were barred by the statute of limitations. (D.2.)

The Tax Court held Section 7502 determines the time when a return is deemed "filed" for purposes of computing the three year statute of limitations within which a notice of deficiency must be mailed. Since the return was filed on or before July 15, 1970, the three year statute of limitations period had expired before the notice of deficiency was mailed, and the proposed assessment was invalid. Therefore, the taxpayer-transferor had no tax liability. *Hotel Equities Corporation, supra.*

On September 3, 1969, petitioner, the sole shareholder of the taxpayer-transferor, and the Director of the taxpayer-transferor adopted a Plan of Liquidation and Dissolution. Pursuant thereto, the taxpayer-transferor was formally dissolved on August 26, 1970. At or before that

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[3] "D." references are to the Court of Appeals decision in *Hotel Equities Corporation v. Commissioner*, 65 T.C. 528 (1975); aff'd 546 F.2d 725 (7th Cir. 1976).

date, the taxpayer-transferor had transferred all of its assets to its sole stockholder, appellant herein.

Petitioner is the transferee of the assets of the taxpayer-transferor. Respondent determined that petitioner, as transferee of the taxpayer-transferor, was liable for the deficiency in income tax for the taxable year ended January 31, 1970 despite the fact that the Tax Court had already determined (affirmed by the Seventh Circuit) there was no liability due from the taxpayer-transferor. *Hotel Equities Corporation, supra.* Moreover, the notice of liability in the instant case was not properly mailed to appellant. Additional facts which are pertinent to the improper mailing of the notice to appellant are as follows.

As previously noted, the taxpayer-transferor had been formally dissolved on August 26, 1970, almost three years before the notice of deficiency was mailed to the taxpayer-transferor on July 17, 1973. Appellee was aware of said dissolution. In fact, more than four months before the expiration of the statute of limitations, representatives of the dissolved taxpayer-transferor corporation had offered to execute consents to extend the statute of limitations. Respondent, allegedly "in accordance with established office procedures", refused to accept such consents and on July 17, 1973 mailed a notice of deficiency to the taxpayer-transferor. It was this notice of deficiency which was later held by the Tax Court to be untimely in *Hotel Equities Corporation, supra,* and thus failed to toll the statute of limitations resulting in any tax liability being barred.

On July 17, 1973, the same day respondent mailed the untimely notice of deficiency to the taxpayer-transferor, respondent attempted to mail *by certified mail* a notice of liability to petitioner, as transferee of the assets of the

taxpayer-transferor. However, Postal Regulation #168.42 specifically provides that *certified mail* may be addressed and used for delivery only:

(a) In the United States, its territories and possessions.

(b) In the Canal Zone.

(c) Through Army, Air Force (AP) and Navy (FPO) post offices.

(d) Through the United Nations N.Y. post office.

Accordingly, the notice of liability could not properly be mailed to respondent in the Bahama Islands by certified mail. But this limitation did not apply to *registered mail* and respondent could have properly mailed the notice of liability to petitioner in the Bahama Islands by *registered mail.* International Mail, Publ. 42, TL-83, 1-2-76.

On or about August 21, 1973, petitioner did receive a notice of liability. However, this notice had not been sent by registered mail as required by Section 6212(a). Petitioner timely filed a petition with the Tax Court alleging, *inter alia,* that the notice of liability was not properly sent to petitioner in accordance with the precise condition of the statute. Further, respondent has never sent appellant a further notice of liability by registered mail.

REASONS FOR GRANTING WRIT

1.

THE DECISION BELOW CONFLICTS WITH THE TRANSFEREE LIABILITY PROVISIONS OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED, AND IF ALLOWED TO STAND WILL IMPOSE TAX LIABILITY UPON TRANSFEREES WHOSE TRANSFERORS ARE NOT LIABLE FOR TAX RESULTING IN A TRANSMUTATION OF SECTION 6901 INTO A PROVISION WHICH DEFINES AND CREATES TAX LIABILITY INSTEAD OF A PROVISION WHICH ALLOWS FOR ENFORCEMENT OF EXISTING LIABILITY, AND THEREBY CREATING, BY JUDICIAL DECREE, A NEW AREA OF TAX LIABILITY.

The transferee liability provisions of the Internal Revenue Code do not create liability but merely provide the Government with a procedural mechanism to enforce an existing and determined liability. An existing, valid transferor liability is the *sine qua non* for the existence of transferee liability. Imposing tax liability on a transferee whose transferor is not liable for tax creates a new liability. If the decision below is allowed to stand, the Internal Revenue Code will, in effect, be amended by the courts and a new liability will have been created.

The Congress of the United States has explicitly stated, over a period of 57 years, that a prerequisite to transferee liability is liability of the transferor. This prerequisite serves the clear purpose of ensuring that Section 6901 works only as an enforcement provision and not as a provision which creates new tax liability.

Prior to the enactment of the Revenue Act of 1926, the Government had experienced serious difficulty in collecting an existing tax liability where a disposition or transfer of assets had rendered the taxpayer insolvent.

The Government was required to proceed by a bill in equity against the transferee to impress a trust upon the transferred assets. The proceedings were cumbersome and involved, and the hope of success was so slight that the Government instituted comparatively few proceedings.[4] To provide a greater assurance of collection of an existing transferor tax liability, the forerunner of the present Code provisions for enforcement of transferee liabilities was enacted as Section 280[5] of the 1926 Act.

Section 280 was substantially and practically identical to Section 6901 of the Internal Revenue Code of 1954. The Senate Finance Committee Report discussing this provision stated:

> "Under existing law proceedings for the enforcement of liabilities such as those theretofore discussed are solely by court proceedings. No proceeding before the board for the redetermination of a

[4] See Casey, Federal Tax Practice, Vol. 3, Section 12.1, Mertens, Law of Federal Income Taxation, Vol. 9, Section 53.01.

[5] § 280. Claims Against Transferred Assets.

(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, or a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits Tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

deficiency and for the ultimate enforcement by assessment and distraint may be had.

"*It is the purpose of the committee's amendment to provide for the enforcement of such liability to the Government* by the procedure provided in the act for the enforcement of tax deficiencies. *It is not proposed, however, to define or change existing liability.* The section merely provides that *if the liability of the transferee exists under other law* then that liability is to be enforced according to the new procedure applicable to tax deficiencies. Thus, upon notice of the liability sent by registered mail . . ." S. Rept. No. 52, 69th Cong., 1st Sess., 1939-1 C.B. (Part 2) 332 at 354. (Emphasis added.)

That it was not the intent of Congress to create new liabilities is also made clear in the Conference Committee Report:

"*Without in any way changing the extent of such liability of the transferee under existing law*, the amendment enforces such liability (whether in respect of the tax as originally returned by the taxpayer or a deficiency therein) in the same manner as liability for a tax deficiency is enforced . . ." H. Rept. No. 356, 69th Cong., 1st Sess., 1939-1 C.B. (Part 2) 361, at 371-372. (Emphasis added.)

Shortly after Section 280 was passed in 1926, the Commissioner was called upon to explain its applicability in a situation involving the statute of limitations, i.e. whether a tax liability which could not be asserted under the law against the transferor-taxpayer because of the bar of the statute of limitations, could be enforced against a transferee. The General Counsel of the Bureau of Internal Revenue stated:

". . . *There is nothing* in the section itself, or in any portion of the Revenue Act of 1926, or in the legislative history of the Act, *which indicates that Congress intended that any liability of the taxpayer*

> *which could not be asserted should be made effective by the provisions of section 280 against the transferee of the taxpayer's property . . .*
>
> *"The section merely prescribes a method for the enforcement of an established liability* and adopts, for this purpose, the method of assessment applicable to the collection of taxes in the ordinary case . . ." G.C.M. 1029, 1027-1 C.B. 115. (Emphasis added.)

Similarly, in *Stegemen v. Commissioner*, 25 B.T.A. 949 (1932), the Board of Appeals stated:

> "It is furthermore to be noted that it was not the intention of Congress in the enactment of section 280 of the Revenue Act of 1926 to impose liabilities upon transferees which did not rest upon them at law or in equity. *A. H. Graves et al.*, 12 B.T.A. 124. Its purpose was simply to provide a new remedy for the enforcement of the liability. *Phillips v. Commissioner*, supra. Cf. *Marion Parsons Spencer*, 11 B.T.A. 437; *Guardian Trust Co.*, Executor, supra; *Charles E. Hammersley*, 16 B.T.A. 68; *Annie P. Kountze*, 17 B.T.A. 928; *Alfred J. Diescher*, 18 B.T.A. 353; dismissed, 44 Fed. (2d) 1013; *William H. Schroll*, 20 B.T.A. 400; *Frank L. Roche*, 21 B.T.A. 1139; *Newport Co.*, 22 B.T.A. 833." (at 954.)

Consistent with the intent of Congress that the transferee's liability can be no greater nor more comprehensive than that of the transferor, numerous cases have held if the transferee can demonstrate that the transferor had no tax liability, a transfer of assets to the transferee cannot give rise to transferee liability. *Commissioner v. Henry Hess Co.*, 210 F. 2d 553 (9th Cir., 1954); *Sherrod v. Commissioner*, 16 B.T.A. 622 (1929); *Kentucky Oil Corp. v. Commissioner*, 21 B.T.A. 1150 (1931); *Januschke v. Commissioner*, 48 T.C. 496 (1967).

The importance of the issue faced and the decision rendered below is clear. The court below has created a

new class of persons subject to Federal income tax in direct conflict with Congressional mandate and judicial interpretation. The transferee liability provisions of the Internal Revenue Code have become, by judicial decree, a source for imposing tax liability where no such liability heretofore existed. The facts show quite plainly that the taxpayer's transferor was not liable for the tax subsequently levied against the petitioner-transferee. The District Court in *Washington Farms, Inc. v. United States*, 116 F. Supp. 142 (D.C. Ga. 1953), mot. den. 122 F. Supp. 31 (D.C. Ga. 1954), explicitly recognized that, where the Commissioner issued a notice of deficiency to a transferor which was held by a proper court to be untimely, therefore extinguishing the transferor's liability, the liability of the transferee is also extinguished. The failure of the court below to recognize that transferee liability is a liability which is solely derivative in nature directly conflicts with clear Congressional intent and creates a new class of taxpayer liability. The creation by judicial fiat of a new class of taxpayer liability is unjustified and beyond the realm of judicial power.

2.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE LEGAL OBLIGATIONS OF THE INTERNAL REVENUE SERVICE TO NOTIFY TAXPAYERS AS TO DEFICIENCIES IN TAX ASSERTED AGAINST THEM, THE DETERMINATION OF THE STATUTORY PERIOD WITHIN WHICH THE INTERNAL REVENUE SERVICE CAN DETERMINE A DEFICIENCY AGAINST A TAXPAYER, AND THE DETERMINATION OF THE STATUTORY PERIOD WITHIN WHICH A TAXPAYER CAN CONTEST THE ASSERTED LIABILITY IN THE TAX COURT OF THE UNITED STATES.

Section 6212 requires the Internal Revenue Service to notify a taxpayer of a determination of deficiency by certified or registered mail. The purpose of the certified

or registered mail requirement is threefold. Certified or registered mail provides a verifiable record of mailing by which the Tax Court can determine whether the taxpayer's petition in the Tax Court in response to the deficiency is timely and whether the Commissioner has complied with the requirements of Section 6501(a) which require a deficiency to be assessed within three years after a return has been filed. It is also necessary to ensure that a taxpayer actually receives the notice of deficiency. Since Congress decided not to require the Commissioner to prove actual receipt of the notice by the taxpayer,[6] it was essential to require the Commissioner to utilize the method of mailing most likely to ensure receipt. Certified and registered mail provides a means of mailing most likely to ensure receipt.

Strict adherence to the certified or registered mail requirement is also necessary to ensure both fairness to the taxpayer and efficiency in the administration of justice. The Internal Revenue Service mails thousands of deficiency notices every year. If the multitude of notices

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[6] Prior to the adoption of the 1924 Act, Representative Allen proposed to amend the language of the second sentence of Section 274(a) as follows:

> within 60 days *after such notice has been received* the taxpayer may file an appeal with the board of tax appeals established by section 900. (65 Cong. Rec. 2969.) (Emphasis added.)

Congress, however, refused to adopt the amendment since it would have compelled the Commissioner to prove actual receipt of the notice by the addressee. As Representative Chindblom stated:

> The department can know when it mails a letter while it cannot know when the addressee received it. The addressee may be away from home or he may have moved, and other things may have occurred which would make it unfair to compel the department to prove that the addressee received the letter. (65 Cong. Rec. 2969-70.)

are not mailed by the means most likely to ensure receipt and yet are allowed to stand, many taxpayers will not receive the deficiency notice and will be unable to contest their tax liability through no fault of their own. Congress sought to minimize this inherent unfairness and yet not place an intolerable burden upon the Commissioner by requiring him to prove actual receipt by the taxpayer. The result of this effort by Congress was the certified or registered mail requirement. Should a less rigid standard be adopted whereby the Commissioner is not required to use certified or registered mail if it can be shown that the taxpayer actually received the notice, the Tax Court will be subject to extensive litigation over the issues of whether the taxpayer ever actually received the notice, whether the notice was mailed within three years of the filing of the returns as required by Section 6501, and when the notice was actually mailed, so as to begin the statutory 90-day period within which the taxpayer can file his petition in the Tax Court. It is this costly burden on the judicial and internal revenue system which Section 6212 was enacted to prevent.

The importance of clear guidelines as to the method by which taxpayers are notified of tax deficiencies cannot be underestimated. Without clear guidelines the entire system under which tax issues are litigated in the Tax Court will be in disarray. Numerous cases confronting the issue have determined that, in the interest of fairness and efficiency, it is crucial that a notice of deficiency be delivered by registered or certified mail. *See Rogers v. Commissioner*, 57 T.C. 711 (1972), Acq. 1972-2 C.B. 2, *Commissioner v. Rosenbaum*, 132 F.2d 677 (3d Cir. 1942), *Block v. Commissioner*, 2 T.C. 761 (1943), *Carbone v. Commissioner*, 8 T.C. 207 (1947), *Williams v. Commissioner*, 13 T.C. 257 (1949), *Hamilton v. Commissioner*, 13 T.C. 747 (1949).

The decision below is in error since it unjustifiably reverses fifty years of uncontradicted Tax Court precedents, ignores explicit Congressional intent carefully and unambiguously embodied in the statute, and injects unnecessary, unwarranted, and undesirable uncertainty into an area of the law that was, and should continue to be, characterized by objective certainty. The precedential basis for the Order by the Tax Court below was the decision of the Ninth Circuit in *Boren v. Riddell*, 214 F.2d 670 (9th Cir. 1957). That case was subsequently cited by the Third Circuit in *Berger v. Commissioner*, 404 F.2d 668 (3d Cir. 1968). However, prior to the case at bar, no Tax Court judge approvingly cited *Boren*; therefore, an unpublished Tax Court Order, that was neither reviewed by the Tax Court nor communicated to the public, was utilized as the vehicle to repeal a statute and overrule fifty years of settled law. In addition, a similarly unpublished order of the United States Court of Appeals for the District of Columbia Circuit affirmed the Tax Court Order.

The taxpayer, in *Boren*, filed his Federal income tax return on March 15, 1952, and on March 11, 1954 the Commissioner sent, by registered mail, a notice of deficiency, that included a fraud penalty, to the taxpayer at an incorrect address. For an undisclosed reason, that notice was conceded by both parties to be "ineffective for any purpose." The Commissioner then mailed a second notice of deficiency by ordinary mail to the taxpayer at his correct address. The taxpayer did not file a petition in the Tax Court and, after the assessment and issuance of a warrant of distraint, the taxpayer sued for an injunction to restrain collection on the ground that the assessment was invalid. The District Court denied the taxpayer's request for an injunction, holding that the second notice of deficiency, mailed by ordinary mail on April 14, 1955, and received by the taxpayer on

April 15, 1955, was a valid notice and timely given because a fraud penalty was alleged and, consequently, the statute of limitations was extended. The Opinion contained only findings of fact, conclusions of law, and the judgment; it contained neither a disclosure of the rationale nor citations to case authority.

The United States Court of Appeals for the Ninth Circuit affirmed, concluding that since Section 6212(a) provides that the Commissioner "is authorized to send notice of deficiency by registered mail", the second notice of deficiency sent by ordinary mail is valid since the language of the statute is merely permissive rather than mandatory. Accepting this analysis, the Commissioner may freely choose to communicate his notice of deficiency by any means, presumably, even verbal or manual notice. In discussing the requirement that the Commissioner use registered mail, the Court stated:

> The earlier cases, particularly those heard by the Tax Court, applied the statutory construction rule, *expressio unius est exclusio alterius*, and held that "notice by registered letter" meant notice in that way, and in no other way; that notice of ordinary mail, or manual delivery, was insufficient.
>
> > "Any other method of notice does not comply with the statute and is invalid. The method directed by the statute is mandatory." *Day v. Commissioner*, 12 B.T.A. 161; . . .
>
> But, argues the Government, the statute now has been revised; it does not now so "limit"; it merely "authorizes" one method of giving notice. It points out that the 1924 Act provided that notice "shall be sent by registered mail", the 1926 Act was revised to provide that the Government was "authorized" to so send the notice; that this word "is a permissive word at most"; that the real objective is actual notice. If notice by registered mail was deemed indispensable, runs the Government argument, it

would have been simple for the Congress to have so provided; i.e. "notice must be served by registered mail." (at 671-672.)

The Court, in accepting the argument of the Government, was obviously misled by the Government's statement that "the Statute now has been revised." That revision had taken place in 1926, more than thirty years before this decision. Section 274(a) of the Revenue Act of 1924 first stated the requirement that if a deficiency existed, ". . . the taxpayer shall be notified of such deficiency by registered mail". In 1926, Section 274(a) was modified to state that if a deficiency exists, the Commissioner ". . . is authorized to send notice of such deficiency to the taxpayer by registered mail". Thus, in 1926, the mandatory "shall" was modified to the discretionary "authorized" but that modification related solely to whether or not a notice of deficiency would be issued and it did not refer to the means by which the notice should be sent.

The Congressional focus in giving the Commissioner discretion rather than a mandatory directive to issue a notice of deficiency was to relieve the Commissioner of the burden of issuing a notice in every case where a deficiency exists. Absent this discretion, the Commissioner was obligated to institute a deficiency procedure for even the most minor of deficiencies, which would prove economically burdensome.

The fact that the requirement that a notice of deficiency, if issued, must be sent by registered mail is confirmed by fifty years of Tax Court precedent interpreting Section 274(a) and Congressional reenactment of Section 274(a) subsequent to the Revenue Act of 1926. Beginning with *Day v. Commissioner*, 12 B.T.A. 161 (1928) and until *Boren* in 1957, there had been no judicial dissent from the view that a notice of deficiency, *if*

sent, must be sent by the required method, namely, registered mail, and that ordinary mail was inadequate. Furthermore, Congress reenacted this section six times without change, clearly affirming the interpretation of the Board of Tax Appeals requiring the Commissioner to utilize registered mail. In the twelve years between the Revenue Act of 1926 and the Board of Tax Appeals' decisions in *Gebelein, Inc. v. Commissioner*, 37 B.T.A. 605 (1938) and *Greve v. Commissioner*, 37 B.T.A. 450 (1938), affirming the registered mail requirement, there had been six Revenue Acts and the only change was to renumber Section 274(a) as Section 272(a). A further affirmation of this result was the amendment of Section 272(a) in the Revenue Act of 1938, requiring that in the case of separated spouses, duplicate notices of deficiencies must be sent by registered mail.

As previously stated, the principle underlying the decisions of the Board of Tax Appeals and Tax Court since *Day, supra*, and the Congressional reenactment of the registered mail requirement, is that all parties, including the Tax Court, must be able to objectively determine the date of effective mailing of the notice of deficiency to alleviate doubt and dispute as to the fact and moment of mailing. Provision for sending such notice by registered mail establishes an incontrovertible means of independently and definitively satisfying this need, and is a jurisdictional prerequisite.

The decision below to ignore clear Congressional and statutory mandate throws the entire issue of Tax Court jurisdiction into disarray, and without modification will result in increased litigation, an undue burden upon the Tax Court, and will greatly open the possibilities for unfair and adverse consequences to the taxpayer. With the ever increasing number of deficiency notices and subsequent litigation in the Tax Court, it is vital for the fair and efficient administration of justice that the clear

and objective guidelines set out in Section 6212 be reaffirmed and strictly adhered to. The courts cannot effectively address the many substantive tax issues which arise in the context of today's increasingly complex system of tax laws if its time and energy is expended in litigating jurisdictional questions which have in the past been avoided by clear and definitive statutory guidelines. The decision below only serves to cloud and disrupt an area of settled law which will bring unnecessary complexity and litigation into an already highly complex and litigous area of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the District of Columbia Circuit.

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1460 September Term, 1982

T-1740 TRUST, MERCANTILE BANK AND TRUST COMPANY LIMITED, TRUSTEE, TRANSFEREE,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Appeal from a Decision of the Tax Court of the United States, No. 8912-73.

Before: WILKEY and BORK, *Circuit Judges* and BAZELON, *Senior Circuit Judge.*

JUDGMENT

This cause came on to be heard on a decision of the Tax Court of the United States, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the decision of the Tax Court of the United States is hereby affirmed.

It is further ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For the Court

/s/ George A. Fisher
Clerk

[Filed January 25, 1983]

EXHIBIT B

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

No. 8912-73

T-1740 TRUSTS, MERCANTILE BANK & TRUST COMPANY LIMITED, TRUSTEE, TRANSFEREE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER

On October 28, 1977, petitioner filed a motion for summary judgment. For the reasons stated in a memorandum sur order attached hereto, it is

ORDERED that petitioner's motion for summary judgment is denied.

/s/ C. Moxley Featherston
Chief Judge

Dated: Washington, D. C.
March 14, 1979

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

No. 8912-73

T-1740 TRUSTS, MERCANTILE BANK & TRUST COMPANY LIMITED, TRUSTEE, TRANSFEREE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MEMORANDUM SUR ORDER

On July 17, 1973, respondent, apparently by ordinary mail, sent the T-1740 Trusts (hereinafter petitioner) a notice which determined that petitioner is liable as transferee for a deficiency and addition to tax owed by Hotel Equities Corporation for the fiscal year ended January 31, 1970, and the taxable period February 1, 1970 to August 31, 1970.

In a case brought by Hotel Equities Corporation following receipt of a notice of deficiency for the taxable year ended January 31, 1970, this Court held that assessment was barred under section 6501(a) because the notice of deficiency was mailed after the 3-year statute of limitations period had expired. *Hotel Equities Corp. v. Commissioner*, 65 T.C. 528 (1975), affd. 546 F.2d 725 (7th Cir. 1976).

Following timely filing of a petition in this Court, petitioner filed a motion for summary judgment on October 28, 1977. In support of its view that this Court should enter judgment for petitioner as a matter of law, petitioner advances the following two arguments:

1. The prior adjudication holding that Hotel Equities Corporation is not liable for the deficiency and addition to tax determined by respondent precludes liability on the part of petitioner as transferee.

2. The notice of deficiency received by petitioner is invalid because it was sent by ordinary mail rather than by certified or registered mail as prescribed by section 6212(a), Internal Revenue Code of 1954.

To support its position that this Court's prior holding in the *Hotel Equities Corp.* case bars the instant action, petitioner argues that a prior adjudication in an action brought by a transferor in a court possessing jurisdiction over the subject matter and the parties is conclusive in respect of the liability of the transferee, citing, e.g., *First Nat. Bank v. Commissioner*, 112 F.2d 260, 262 (7th Cir. 1940), cert. denied 311 U.S. 691 (1940). These authorities have been applied against the government proceeding against a transferee. *Carney v. Commissioner*, 22 B.T.A. 721, 724 (1931).

All of these cited authorities, petitioner concedes, involve adjudications on the merits of the tax claim, whereas the decision in the *Hotel Equities Corp.* case was based solely on the ground that the notice of deficiency was mailed too late. Petitioner argues, however, that this Court's decision in *Krueger v. Commissioner*, 48 T.C. 824 (1967), which involved a stipulated decision, extends the principle to cover the instant case. Since transferee liability is derived from liability of the transferor, petitioner contends, the prior adjudication means that there is no deficiency which respondent may assess against petitioner.

We do not agree. The Krueger decision was based on the principle of collateral estoppel which applies not only in cases involving the same parties but also where the party in the second suit is in privity with the party in the first suit. The *Krueger* opinion (though it uses the broader term "res judicata") holds merely that, since an estate is in privity with the transferees of the estate, a stipulation by the estate in a prior Tax Court case as to the amount

of the tax liability of the estate estops the transferee from relitigating the issue in a second case.

In the instant situation, the *Hotel Equities Corp.* case did not deal with the merits of the Commissioner's tax claim but rather with the statute of limitations applicable to assessment of the deficiency. The merits of the tax claim were not decided. Since the issue decided in that case is not the same issue as is before the Court in the instant case, the principle of collateral estoppel does not apply here. *Commissioner v. Sunnen,* 333 U.S. 591, 597-598 (1948). The parties have not had their day in court with respect to the substantive issues. Neither have they waived their right to an adjudication on the substantive issues.

Furthermore, for petitioner to prevail on this ground would undercut the special statute of limitations provisions applicable to transferees. Congress enacted the predecessor of sections 6901(c) and 6503(i) in order to prolong the period during which the Commissioner may proceed against the transferee. *Estate of Marix v. Commissioner,* 15 T.C. 819, 827 (1950). The prior adjudication upon which petitioner relies held that respondent mailed the notice of deficiency after the 3-year period prescribed by section 6501 had expired; a corollary of that holding, which petitioner does not dispute, is that the notice of deficiency was mailed petitioner within the 4-year period under section 6901.

As this Court noted in discussing predecessor sections, section 6501 "is merely part of a comprehensive scheme of limitations provisions, and was in general not intended to erase tax liability at the termination of the period specified therein." *Estate of Marix v. Commissioner, supra* at 825. Therefore, the prior adjudication has not extinguished the tax liability of the transferor, nor has it barred respondent from litigating the substantive issues relevant to that liability.

Since the notice of deficiency apparently was sent by neither certified nor registered mail, petitioner argues, respondent did not meet the requirements of section

6212(a) which, by reference, are incorporated into section 6901. The 4-year period prescribed by sections 6501(a), 6503(a) and (i), and 6901(c) for assessment of transferee liability having expired, petitioner concludes that assessment and collection of the deficiency are now barred.

Respondent observes that this argument would be more appropriately addressed to a motion to dismiss for lack of jurisdiction rather than to a motion for summary judgment. Because this Court must consider questions of jurisdiction whenever and however raised, we deal with the issue here. *Wheeler's Peachtree Pharmacy, Inc. v. Commissioner*, 35 T.C. 177, 179 (1960); *National Committee to Secure Justice, Etc. v. Commissioner*, 27 T.C. 837, 839 (1957).

The requirement that the Commissioner mail a notice of deficiency has a twofold purpose: to inform the taxpayer that a deficiency has been determined and to provide him with an opportunity to petition this Court for redetermination of that deficiency. *Delman v. Commissioner*, 384 F.2d 929, 932-934 (3d Cir. 1967), cert. denied 390 U.S. 952 (1968); *Commissioner v. Stewart*, 186 F.2d 239, 241 (6th Cir. 1951); *Lifter v. Commissioner*, 59 T.C. 818, 824 (1973). In the absence of receipt by the taxpayer, courts have insisted upon compliance with the procedure set out in section 6212(a) before upholding the adequacy of the notice. E.g., *Houghton v. Commissioner*, 48 T.C. 656 (1967). In contrast, when the Commissioner has failed to comply with all requirements of section 6212(a) but a taxpayer has received the notice without prejudice to his right to petition this Court, courts have held that the deficiency notice was adequate. *Clodfelter v. Commissioner*, 527 F.2d 754 (9th Cir. 1975), cert. denied 425 U.S. 979 (1976); *Berger v. Commissioner*, 404 F.2d 668, 672-674 (3d Cir. 1968), cert. denied 395 U.S. 905 (1969); *Boren v. Riddell*, 241 F.2d 670, 673-674 (9th Cir. 1957). To illustrate the scope of this judicial tendency, one case has held that personal service of the deficiency notice will suffice. *Tenzer v. Commissioner*, 285 F.2d 956, 958 (9th Cir. 1960).

Therefore, the notice of liability at issue here satisfies the requirements of section 6212(a). We find persuasive neither petitioner's citations to earlier case law nor its attempt to distinguish cases which construe the term "last known address" from the instant case. Recent authority has rejected an earlier rigid construction of section 6212(a). See *Boren v. Riddell, supra* at 671-673. The policy underlying the requirements of mailing to the taxpayer's last known address and by registered or certified mail is the same, to ensure actual notice to the taxpayer. Thus a case dealing with a notice incorrectly addressed relied in part on the holding in *Boren v. Riddell, supra,* a case in which notice was given by ordinary mail. *Clodfelter v. Commissioner*, 527 F.2d at 757.

/s/ C. Moxley Featherston
Judge

Dated: Washington, D.C.
March 14, 1979